United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-2117

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America ex. rel. Theresa Simmons, Petitioner-Appellant vs. Frances Clemente Correction Superintendent Bedford Hills Correctional Facility Bedford Hills, New York Respondent-Appellee	To be argued by: Harry I. Subin No.: 76-2117

BRIEF AND APPENDIX
FOR APPELLANT

APPEAL FROM THE DENIAL OF A PETITION FOR A WRIT OF HABEAS CORPUS BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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To be argued by:

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United States of America ex rel Theresa Simmons,	:	
Petitioner-Appellant,	:	Docket No. 76-2117
- against -	:	
Frances Clemente, Superintendent Bedford Hills Correctional Facility Bedford Hills, N.Y.	:	

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BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that the testimony of the chief witness for the state at the state court trial of appellant was admissible as sufficiently the product of the exercise of free will to purge the tainted source of that testimony.

2. Whether the District Court should have held an evidentiary hearing on whether the testimony of the chief witness for the state at the State Court trial of appellant was the fruit of appellant's illegal arrest and interrogation.

3. Whether appellant is entitled to review by a federal habeas court or was either provided a full and fair opportunity to litigate her constitutional claim in state court; or deliberately by-passed her state remedy.

STATEMENT OF THE CASE

(a) Preliminary Statement

This appeal is from the denial of a petition for a writ of habeas corpus which appellant filed in the United States District Court for the Southern District of New York on February 27, 1976. The petition (D.* 1) was denied without a hearing in an opinion filed on August 13, 1976 by the Hon. John M. Cannella. (D. 6)** A notice of appeal was filed on September 13, 1976. (D. 7). On September 23, 1976 Judge Cannella granted appellant's motion for leave to appeal in forma pauperis, and on September 30, 1976 Judge Cannella granted appellant's motion for a certificate of probable cause.

(b) Statement of Facts

(1) Circumstances of the Offense, Arrest, Interrogation and Trial

In the early morning of January 13, 1966, Martin Seiler was shot and killed in his taxi cab. Investigation at the scene of the crime revealed no eye witnesses,

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* "D" refers to the numbered documents in the Record on Appeal in this Court. A copy of the docket sheet below is annexed as Appendix A.

** A copy of Judge Cannella's opinion is annexed as Appendix B.

no fingerprints, (111) and nothing of ballistic value. (801)* Seiler's body was taken to the Harlem Hospital at approximately 4:45 a.m. (123, 131). There it was examined by Dr. Gladstone Hodge, who determined the cause of death to have been a small-caliber bullet (985).

Shortly thereafter, the appellant Theresa Simmons arrived at the same hospital, bleeding from the arm. She, too, was examined by Dr. Hodge. She said that she had injured her arm in a door. Dr. Hodge told her that he thought that she had been shot, which she denied (985, 1034). Dr. Hodge also told Patrolman William Leslie, who was stationed at the hospital, that the appellant had been shot and that the wound in her arm was similar to that in the deceased and could have come from the same gun (1946, 180, 217. Patrolman Leslie, and later Detective Stanise (who was assigned to the homicide case), questioned the appellant at the hospital. She told him exactly what she had told Dr. Hodge (324-326, 337-339, 738-739). This questioning by the police occurred between 5:10 a.m. (182, 201, 339).

At approximately 5:39 a.m., and on the basis solely of

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* Numerical references are to pages of the printed transcript of the state court trial, appended to the record in this Court an an Exhibit, pursuant to a stipulation entered into between the appellant and appellee, filed in this court on _____, 1976.

the aforementioned information, the appellant, along with her sister Constance, with whom she had gone to the hospital, was arrested by Detective Stanise and taken to the 32nd Precinct (245, 327, 706, 743), with Ptl. Leslie noting in his memo book that there was a "possible connection" between the appellant and the homicide (353).

At the precinct, the questioning of the appellant continued until 3:30 p.m., when she repeated a statement made to the police to Assistant District Attorney Hughes, admitting her involvement in the crime, and giving the name of the person who had taken part in the crime with her, Peggy Barbour (1218, 1229-30, 1235-46). At no time during the interrogation was the appellant advised of her right to remain silent, her right to counsel, that anything she said could be used against her, or that counsel would be provided if she was unable to retain a lawyer.* At trial, the People therefore conceded that the taking of the statement was violative of the standards established in Miranda v. Arizona, 384 U.S. 436 (1966) (528, 1200).

Solely as a result of the information obtained from the appellant during the interrogation, the police searched

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* Petitioner received no food during this period. She was, moreover, told that if she did not cooperate, her brother and sister would be arrested (1228-9).

for Peggy Barbour and on January 14, 1966, they found and arrested her. She, too, admitted her involvement in the crime, giving a formal statement to Assistant District Attorney Harris (543, 690).

Also as a result of the interrogation, the police learned the location of the appellant's apartment and questioned her brother, Nathaniel Simmons. He told the police that he had seen his sister and another woman, whom he did not know (411, 767), the night before and that his sister had been injured. The police searched the apartment and found the gun which had been used in the crime, and on the roof of the building found the keys to the ignition of the deceased's cab driver (707-9, 754-5, 766-8).

Subsequently, both the appellant and Barbour were charged with homicide. Counsel were appointed for both of them, and they were detained in the Women's House of Detention. During the period from January to September, 1966, Barbour consulted on several occasions with her attorney. He advised her that the case against her was a very strong one, because of the statements she and appellant had made to the police. Ultimately, Barbour was offered a plea of guilty to manslaughter in the second degree on the condition that she testify against the appellant, and with the

understanding that sentencing would be deferred until after she testified against appellant (493-4, 1292). Barbour's attorney advised her that in view of the strength of the case against her, the plea offer was a good one.

On September 19, 1966, Barbour pleaded guilty to manslaughter, noting that "when I found out I had a chance to get the plea, that sounded better than twenty to life, or natural life (551)."

In January, 1967, Barbour testified at appellant's trial, in hopes, as she put it, of getting a sentence "other than what I was going to get." (697). In her testimony, she provided the only evidence in the case in chief which placed the appellant at the scene of the crime and which described appellant's role in it; and in which she provided the only evidence linking the gun discovered in appellant's apartment to the shooting. (513-516).

Appellant was convicted and received a term of natural life. Barbour ultimately received a sentence of 1-5 years.

(2) Litigation of the Issue of the Admissibility of Barbour's Testimony at Appellant's Trial.

At no time prior to or during the trial of the appellant or on appeal of her conviction did her attorney discuss with her, or advise or counsel her with respect to her right to ob-

ject to the testimony of the witness Barbour, and at no time did her attorney move to suppress this testimony. Appellant, an uneducated woman with no prior experience with the criminal law, was unaware of her right to move for the suppression of this testimony. (D.3)*

The issue was first raised in 1973, in a motion to vacate judgment on the grounds that Barbour's testimony was the fruit of the illegal arrest and interrogation of the appellant. This motion was denied without a hearing by the Supreme Court of New York County in September, 1973. (D.3)** In ruling against the appellant, the Court applied New York's "inevitable discovery rule", holding that the normal course of police investigation would, even absent the illicit police conduct, have inevitably led to the evidence in question. The Court also held that, under New York law, appellant had waived her objection to the introduction of the evidence by not objecting to it at the time of the trial. See N.Y.C.P.L. §440.10. This decision was affirmed without opinion by the Appellate Division in October, 1974.

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* See Affidavit of Theresa Simmons, appended to petitioner's memorandum in support of petition for writ of habeas corpus.

** Judge Davidson's opinion to appear as Appendix B of appellant's memorandum in support of Petition for Writ of Habeas Corpus.

On March 2, 1976 appellant filed a petition for writ of habeas corpus in the United States District Court, arguing that her arrest and interrogation were illegal; that Barbour's testimony was the tainted fruit thereof; that the state court judge had erroneously applied the "inevitable discovery rule"; and that she had not waived her right to assert her Fourth Amendment claim under Federal standards of waiver.

Judge Cannella denied the petition, without a hearing, on August 13, 1976. In its opinion * the court made no reference to the "inevitable discovery rule" on which the New York Supreme Court had based its decision,** and did not rule on the question whether the appellant had waived her right to assert her constitutional claim or was otherwise barred from seeking Federal habeas. Reaching the merits of the Fourth Amendment claim, the Court assumed that the appellant's arrest and interrogation had been illegal, and that Barbour's identity had been discovered thereby. The Court found, however, that Barbour's testimony was admissible because it was the result of an "independent act of free will" on her part, which purged the

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* Appendix B.

** The argument had been abandoned by appellee as well. See D. 4, Memorandum in Opposition.

the taint of the constitutional violation.

The Court's finding that Barbour's decision to testify was an independent act of free will was based upon these findings of fact, all gleaned from the transcript of the state proceeding:

1. Barbour confessed to the police after her arrest.

2. Eight months passed before her decision to plead guilty which was made on advice of counsel and in order to expose herself to a lesser scope of punishment.

The Court concluded from these facts that Barbour's testimony was not the result of the state's exploitation of appellant's illegal arrest and interrogation, but of Barbour's voluntary decision to plead guilty and testify.

ARGUMENT

Introduction

The presentation of the issues on appeal in this case is somewhat complicated by the failure of the District Court to address two issues strongly urged by the appellee below and fully briefed by both parties, either of which might form an independent ground for decision in this Court. While appellant believes that the District Court was fully justified in disregarding those issues and reach-

ing the merits of the constitutional claim, she is cognizant of the fact that this Court will be asked to consider them, and therefore believes that it might aid the Court to recapitulate her arguments on them.

The two issues in question, in addition to the question whether the District Court correctly decided that Barbour's testimony was the result of an "independent act of free will" are these:

1. Whether the arrest and interrogation of the appellant were illegal; and

2. Whether appellant barred from obtaining federal habeas corpus either because she has received a "full and fair opportunity" to litigate her claim, Stone v. Powell, U.S. , 96 S.Ct. 3036, 49 L.Ed. 2d 1067 (1976), or because she has waived it by failing to object to the introduction of Barbour's testimony at trial, Fay v. Noia, 372 U.S. 39, (1963). Appellant's argument demonstrating that the arrest and interrogation were illegal would be contained in Point I of her Argument: the right of appellant to federal habeas relief will be presented in Point III.

POINT I

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE TESTIMONY OF THE CHIEF WITNESS FOR THE STATE AT APPELLANT'S TRIAL WAS SUFFICIENTLY THE PRODUCT OF FREE WILL TO PURGE THE TAINTED SOURCE OF THAT TESTIMONY.

A. THE ARREST OF THE PETITIONER WAS CLEARLY UNLAWFUL.

It is well settled that an arrest made on less than probable cause is illegal. Agnello v. U.S. 269 U.S. 20 (1925), Jones v. U.S. 357 U.S. 493 (1958). Suspicion alone does not, of course, justify an arrest.

No extended discussion is necessary to demonstrate that the facts and circumstances known to the police at the time of appellant's arrest at the hospital fell far short of the legal standards of probable cause. While it is of course clear that Seiler's death gave the police cause to believe that a crime had been committed, their reason to connect the appellant with this crime hardly rose even to the level of suspicion. The only "evidence" which the police had at the time of arrest were a doctor's opinion that the wounds of Seiler and the appellant were caused by a similarly sized caliber bullets and, presumably, that they did not believe appellant's explanation that she had caught her arm in a door. They had no witnesses to the crime, they had discovered no evidence at the scene; they had not discovered the weapon; X-rays of the petitioner's arm were inconclusive; and she had made no statements in any way connecting herself with the event. Indeed, the fact that appellant had been shot would seem to lead much more reasonably to the conclu-

sion that she was a victim of a crime, not a perpetrator.

Further support for the conclusion that the arrest was illegal is found in the following:

1. At the time of the arrest, one of the arresting officers noted in his memo book that there was a "possible connection" between the appellant and the death of Seiler. This indicates that the arrest was for investigation or questioning and, as the Supreme Court recently observed in Brown v. Illinois, 422 U.S. 590 (1975), such an arrest is not permissible under the Fourth Amendment. The Court's conclusion in Brown, supra, is applicable here:

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious . . . The arrest, both in design and execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up . . . 422 U.S. at 605.

2. The People, in their brief on the original appeal of this case clearly stated the basis upon which the arrest was made:

> The similarity between the bullet wounds in the neck of the deceased and the bullet wound on the defendant's arm was noticed, and this led, eventually, to her arrest. (page 2)

In short, at the time of appellant's arrest the police had at most an unsupported suspicion that she might have been involved in the crime. All of the evidence on the case, including the identity of the co-defendant, came after her arrest and solely as a result of her interrogation at the precinct.

In the Court below, appellee argued that the appellant was not arrested, but simply "detained" at the precinct, a position quite evidently designed to avoid the consequences of Wong Sun v. U.S., 371, U.S. 471 (1963), and Brown v. Illinois, 422 U.S. 590 (1975). Even the respondent states that "Detective Kitchman and Sergeant Stanise then took the petitioner to the station house",* but characterizes that "taking" as a kind of continuing "detention". Respondent then argues that the detention was not transformed into an arrest until after the defendant was confronted, hours later, with the "murder weapon". The respondent concludes (at p. 34, Respondent's Brief) that the "police had probable cause to arrest petitioner after the murder weapon was discovered in her apartment"; and had additional probable cause after she made her incriminating statement. There are fundamental flaws in this analysis: first, the police found a .22 caliber pistol in the apartment - they could not possibly have known it was the murder weapon until the appellant identified

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* D.4, Respondent's Brief in Opposition.

it as such.* Secondly, it is patently clear that the police cannot "legalize" an arrest without probable cause on the basis of the statements made by the person who was being illegally detained. Even if the police had warned the appellant of her rights, which they did not, the illegal arrest would have tainted her statements. Brown v. Illinois, supra. The reason for this is clear. If it were possible to sanitize illegal police conduct in this way, then every illegal arrest could be converted to a legal one. U.S. ex. rel. Ramsey v. Zelker, 356 F. Supp. 275 (S.D.N.Y. 1973), cited by the respondent, is not to the contrary. There, Judge Frankel found that it was likely that probable cause existed for the defendant's arrest. Even if it did not, however, Judge Frankel found that where the complaining witness subsequently came to the precinct, and identified the defendant, probable cause was provided, and the defendant's subsequent statement was not tainted. Here the only "evidence" which the police had was a gun found in appellant's apartment; and it was only after she identified the gun that the police may have had probable cause to believe that the appellant was involved in the crime. Without that statement from the appellant herself, all that the police could have reasonably concluded was that a person who they believed to have been

* Unless, of course, she made her statement before the search, in which case even the gun cannot be used to support respondent's novel theory.

shot in the arm lived in an apartment, with two other persons, in which was found a gun which could have inflicted that wound.

B. THE POST-ARREST INTERROGATION OF THE PETITIONER WAS UNLAWFUL.

Following appellant's arrest she was taken immediately to the 32nd Precinct where she was interrogated for over nine hours. She was given no warnings, a fact conceded by the District Attorney at trial. As a result of this clear violation of Miranda v. Arizona, 384 U.S. 436 (1966) the District Attorney also conceded that he could not use her statement as evidence in the case in chief.

The illegality of the interrogation, moreover, can be demonstrated on other grounds, more central to the issue in the instant case: for it was clearly tainted by the illegality of appellant's arrest. Whatever the violation of her Fifth Amendment rights, therefore, there was also a clear violation of appellant's rights under the Fourth Amendment. Brown v. Illinois, supra, is directly apposite here. There, the defendant had been arrested without probable cause and given his Miranda warnings, after which he made incriminating statements. The Court, relying on Wong Sun v. U.S., 371 U.S. 471

(1963) rejected the argument that the warnings served to remove the taint of the illegal arrest:

> Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for a causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint' . . . 422 U.S. at 602.

If full Miranda warnings in Brown did not purge the taint of the illegal arrest there, it is impossible to see how the interrogation in the case at bar, where no warnings were given, could be valid.

C. THE IDENTITY OF THE CO-DEFENDANT PEGGY BARBOUR WAS DERIVED FROM THE ILLEGAL INTERROGATION OF THE PETITIONER, AND HENCE WAS ILLEGALLY OBTAINED.

Granting the illegality of the initial arrest, it follows that any evidence derived from that arrest should have been suppressed. Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920); Nardone v. U.S., 308 U.S. 338 (1939). The test for suppression of fruits of illegal police activity was stated in Wong Sun v. U.S. supra, a case remarkably similar to the case at bar. There, the house of one Toy

was illegally entered, and Toy was illegally arrested by federal agents, who questioned him about his involvement in the narcotic trade. Toy told the agents that he had dealt with one Yee. The agents then found Yee, who incriminated Toy, and who produced narcotics purchased from Toy. The Court, holding that both Toy's statements and the narcotics obtained from Yee should have been excluded under the "fruits" doctrine, stated the following test for determining whether fruits must be excluded:

> . . . Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come by exploitation of that illegality or instead by means sufficiently distinguishable to purge the primary taint . . . 371 U.S. at 387-488.

The Court held that the illegal arrest of Toy had tainted the statements made by Toy, refusing to draw a distinction between verbal evidence and tangible evidence so discovered:

> . . . verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officer's action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. . . Id. at 485.

The Court rejected the argument that Toy's statement resulted from an "intervening act of free will" which oper-

ated to dissipate the taint, noting that he was questioned by several agents in his home immediately following his arrest.

Toy's statement, the Court observed, led directly to Yee and the discovery of the narcotics. Noting that the prosecutor had conceded that without Toy's statement, the drugs would not have been found, the Court held that there was no basis for holding that the agents had an "independent source" for the drugs, Silverthorne Lumber Co., supra, and hence that the drugs as well as the statement had to be excluded.

There is an almost identical fact pattern in the instant case. The arrest of the appellant, like that of Toy, was without probable cause and hence was illegal; the "primary taint" is thus clearly established. Appellant's statement, like that of Toy, was taken under circumstances clearly indicating that it was not an "intervening act of free will". Indeed, if anything, the statement was taken under circumstances more oppressive than in Wong Sun. The appellant, who recently had been shot in the arm was interrogated in a police precinct for approximately nine hours. The District Attorney has conceded that no warnings of any kind were given to her. At trial, the appellant testified without contradiction that she received no food during this

period, and that she was told that if she did not confess her brother and sister would be arrested (1228-9). While no claim is made by appellant here that her confession was coerced as a matter of law, she does claim that it was not an "intervening act of free will" in the sense intended by Wong Sun.

It is necessary to comment at this point upon the recent decision of the United States Supreme Court in Michigan v. Tucker, 417 U.S. 433 (1974). In Tucker, the defendant had as in the present case, been questioned by the police prior to the decision in Miranda v. Arizona, supra, and was tried after the Miranda decision, thus bringing into play Miranda's exclusionary rule. See Johnson v. N.J., supra. Before questioning Tucker, the police advised him of his priviledge against self-incrimination, told him that anything he said could be used against him, and asked him whether he wanted an attorney. Tucker waived his rights, and gave the police an alibi story which was refuted at trial by the alibi witness. Tucker claimed that the alibi witness' testimony should have been excluded because the warnings he received from the police did not comply fully with Miranda, since the police did not tell Tucker that he had a right to free counsel if he could not afford one.

The Court agreed that the Miranda rules had not been

fully complied with, and that therefore Tucker's statement itself was properly excluded. It refused, however, to apply the exclusionary rule to the fruits of that statement (the alibi witness' testimony) holding, in effect, that since there was substantial compliance with Miranda, and no other evidence that the statement was involuntary, it would not serve the deterrent purpose of the exclusionary rule to apply it to the fruits of the statement. Noting that Miranda embodied a "new doctrine" pursuant to which an unwarned defendant's statements might be excluded at trial "despite their voluntary character under traditional principles", the Court found that where the police had taken steps to insure against self-incrimination, and had, moreover, relied in good faith upon existing law defining the scope of the right to counsel at the precinct, Escobedo v. Illinois, 378 U.S. 478 (1964), it would limit the application of the exclusionary rule to the statement itself.

Central to the Court's decision was its finding that Tucker's constitutional rights had not been violated, but merely one of Miranda's prophylactic rules. It is this finding which distinguishes Tucker from the instant case, on two separate grounds:

1. The questioning of the appellant in the in-

stant case constituted a wholesale violation of Miranda, and not simply an inadvertant one, as in Tucker. The appellant, who had recently been shot in the arm, was not only questioned at great length at the precinct, but received no warnings whatever. She was not told of her priviledge to remain silent, as was Tucker. She was not told that anything she said could be used against her, as was Tucker. She was not told of her right to counsel, as was Tucker. The police conduct in petitioner's case therefore fits precisely the circumstances which led the Court in Miranda to exclude the testimony under its "new doctrine" for protection of Fifth Amendment rights. As the court said in Miranda:

> . . . In these cases we might not find the defendant's statements to have been involuntary in traditional terms. . . To be sure, the records do not evince overt physical coercion or patent psychological ploys. The facts remain that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the investigation to insure that the statements were truly the product of free choice. 384 U.S. at 457.

It was solely on the basis that the police in Tucker did "undertake to afford appropriate safeguards" that the Court limited the application of the exclusionary rule by refusing to apply the "fruits" doctrine. Tucker clearly

does not stand for the proposition that the exclusionary rule does not apply to pre-Miranda interrogations: indeed, the Court upheld the rule notwithstanding the very minor violation which occurred in Tucker. If even such a trivial violation was sufficient to cause exclusion of Tucker's statement, despite the need expressed by the Court for "balancing the interests involved", then it follows that where there was a total failure of the police to safeguard the defendant's rights, neither the statement so obtained nor its fruits should be available to the prosecution. Had the Court intended to announce a blanket rule making the "fruits" doctrine inapplicable in pre-Miranda cases, it would have done so. The middle position which the Court took suggests that while substantial compliance with Miranda will suffice to block application of the "fruits" doctrine, that doctrine will remain applicable when there has been no compliance whatever.

2. Whatever the application of Tucker to a case where no warnings were given, it clearly does not apply where, as here, there was a violation of the defendant's Fourth Amendment rights.

Tucker the Court permitted fruits to be used only because it found no violation of constitutional rights at the source of the evidence. But the Court expressly distinguished Tucker from Wong Sun, supra, where, as appellant has demonstrated, a "primary illegality" almost identical to that in the case at bar occurred.

Even if, therefore, it were found that there had been good faith reliance by the police on then-prevailing law when they did not warn the petitioner of her rights against self-incrimination, and that consequently no Fifth Amendment violation had occurred, the "fruits" doctrine should be applied. Whatever arguments might be mustered to defend against the failure of the police to safeguard appellant's "free choice" in giving a statement, none can even be imagined to explain away their decision to arrest her without probable cause. There was no good faith reliance upon existing law on this score: the police even at the time were fully aware that they had no right to arrest without probable cause, and had every reason to know that the exclusionary rule and the "fruits" doctrine would be available to deter them from doing so. Mapp v. Ohio, 376 U.S. 643 (1961); Wong Sun v. U.S., supra. This, indeed, is precisely the basis for

the Court's decision in Brown v. Illinois, supra.*

C. THE TESTIMONY OF BARBOUR WAS THE PRODUCT OF EXPLOITATION BY THE STATE OF THE ILLEGAL ARREST AND INTERROGATION OF APPELLANT, AND WAS NOT AN "INDEPENDENT ACT OF FREE WILL" ON BARBOUR'S PART.

1. Barbour's testimony was the fruit of the illegal arrest and interrogation of the appellant.

There is no question in the instant case that Barbour's identity was obtained directly and exclusively from the illegal arrest and interrogation of the petitioner. The question arises whether Barbour's testimony, as well as her identity, is "fruit of the poisoned tree", Silverthorne Lumber Co., v. U.S., supra. Clearly, the fact that the evidence in question is testimonial rather than tangible is irrelevant, Wong Sun v. U.S., supra. The test in either case is whether the state can prove that there was an "independent source" for

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* Respondent attempts to distinguish Brown from the instant case on the grounds that:

> ". . . unlike the petitioner, Brown was, at the time of his arrest, not even a suspect in the murder for which he was arrested." (Respondent's Brief, p. 29).

While the petitioner, of course, appreciates respondent's concession that she was a "suspect" at the time of her arrest, petitioner submits that the Supreme Court in Brown made no distinction between various categories of persons arrested without probable cause.

the testimony. U.S. v. Nardone, supra, Wong Sun v. U.S., supra.

There is authority for the proposition that the witness himself can provide that independent source. In Smith & Bowden v. U.S., 324 F.2d 879 (D.C. Cir. 1963), the Court observed that an intervening exercise of free will by the witness might break the chain. (There, the witness was an eye-witness to the crime, who had a change of heart about testifying.) See also People v. Mendez, 28 N.Y.2d 94, cert. denied, 404 U.S. 911 (1971).

These cases seem clearly to require that in order to purge the taint of a primary illegality, it must be shown that the witness' testimony was free and voluntary, stemming from forces within the person unconnected with the illegal police conduct, and not induced by exploitation by the state of the illegally obtained evidence. As Judge (now Chief Justice) Burger, the author of Smith & Bowden, put it in Copeland v. U.S., 343 F.2d 288 (D.C. Cir. 1965), the test is whether the illegally obtained evidence was used as a "lever" to induce the witness to speak. As the Fifth Circuit Court of Appeals has stated, there must be proof of a change of attitude by the witness, and showing that the:

> . . . witness came forward by his own volition, regardless of his identification by the illegal search, would be extremely relevant to a determina-

tion of attenuation. U.S. v. Marden, 474 F.2d 1192 (1973).

See also Smith and Anderson v. U.S., 344 F.2d 545 (D.C. Cir. 1965) (requiring proof of a "spontaneous" act by the witness).

The controlling authority on the so-called "tainted witness" issue in this Circuit may be found in two cases: Tane v. U.S. 329 F.2d 848 (2d Cir. 1964) and Karathanos v. U.S., 531 F.2d 26 (1976).

In Tane, an illegal wiretap of the defendant and a third person led to one Pase. Pase was thenquestioned about illegal activities which he denied. Subsequently, he was confronted by the evidence obtained from the illegal wiretap. He then admitted his involvement, and implicated the defendant. The defendant objected to Pase's testimony on the grounds that it was derived from the illegal wiretap. The Court, rejecting the Government's contention that Pase's testimony was the result of an intervening voluntary act on his part, concluding that his willingness to testify was the direct result of the Government's exploitation of the illegal wiretap, with which it confronted the witness. Distinguishing Smith and Bowden, supra, the Court held that:

> While the proffer of a living witness should not be "mechanically equated with the proffer of inanimate evidentiary objects illegally seized" (citing Smith & Bowden, supra), the government has failed to carry its burden of showing that the information gained from the wiretap did not lead, directly or indirectly, to the discovery of [the witness] and to [his] willingness to testify . . . 329 F.2d at 853.

See also U.S. v. Schipani, 289 F. Supp 43 (S.D.N.Y. 1968), aff'd 414 F.2d 1262 (2d Cir. 1969), where Judge Weinstein stated the applicable rule:

> If illegally secured information leads the government to substantially intensify an investigation, all evidence subsequently uncovered has automatically 'been come by exploitation of that illegality'. The unlawful search has set in motion a chain of events leading to the government's evidence. 289 F. Supp. 43, 62.

In Karathanos v. U.S., supra, the defendant was prosecuted for harboring illegal aliens. The Government attempted to introduce the testimony of the aliens who had been seized during the course of a search made pursuant to an invalid search warrant. The defendant objection objected on the grounds that the witnesses' testimony was derived from the illegal search. The Court agreed, holding that the testimony was procured by the Government by

the use of the "leverage" which the Government gained through the illegal search of the defendant, and the subsequent arrest of the aliens. Reaffirming its holding in Tane v. U.S., supra, the Court said:

> Once the aliens were arrested (in the course of the illegal search) the INS agents had obtained considerable leverage over them, since it was within the government's discretion to prosecute and deport them, or to allow to leave the United States voluntarily... The government concedes that the aliens' testimony was prompted by use of this leverage; their agreement to testify came only after a promise to allow them to voluntarily depart without prosecution. In these circumstances, we think their decisions to testify cannot accurately be characterized as intervening 'acts of free will' of sufficient independence 'to purge the primary taint of the unlawful invasion...' The testimony is not the unpredictable result of the influence which the government possessed over the aliens once they had been arrested during the initial illegal search, and if such reasonably foreseeable fruits of the search were deemed admissible, it might help to induce further searches without probable cause... *

From Tane and Karathanos emerge two distinct tests for determining whether a witness' testimony is the re-

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* 531 F.2d at 35.

sult of an exploitation of a primary illegality rather than an exercise of independent will.

1. When the witness agrees to testify after being confronted with the product of the official illegality. (Tane)

2. Where the government uses the leverage which it has obtained over the witness as a result of its illegal conduct towards the defendant in order to induce the witness to testify. (Karathanos)

Applying these tests to the instant case, it is apparent that both are met: Barbour, like the witness Pase in Tane was identified as a result of the illegal interrogation of the appellant. Brought to the precinct, she confessed. And, while the record is insufficient to permit a determination that she was confronted with appellant's statement, it is inconceivable that she was not: she knew, in any case, that her arrest was the result of her identification by appellant, since she knew that appellant had been arrested, and since only the appellant knew her identity.

Following Barbour's arrest, she was detained without bail for eight months, after having been indicted for murder. Ultimately, like the aliens in Karathanos, she

agreed to testify against appellant because of a promise of leniency in the form of a drastically reduced plea (and promise of consideration on sentence) if she testified.

The District Court rejected the analogy between the instant case and Tane and Karathanos, finding that Barbour's testimony was an independent act of free will on the basis of the following facts, which, on analysis, do nothing to alter the result urged by the appellant:

1. Barbour confessed to the police after her arrest. As appellant has just demonstrated, what evidence there is on the record strongly suggests that Barbour's confession occurred after she was arrested and presented with the evidence illegally obtained from the appellant. This is not, then, a case like Smith & Bowden, supra, where a contrite eyewitness - not an arrested suspect charged with murder - voluntarily appears because of a change of heart. Barbour's confession, it is submitted, was the result of an exploitation of the illegal police conduct, and as such reinforces, rather than breaks the chain of illegality leading to her testimony.

2. Barbour's decision to testify did not occur until eight months after her arrest. There may,

no doubt, be situations where the passage of time provides evidence that a witness has reached an independent, voluntary decision to testify, unrelated to police illegality. (See, e.g., Wong Sun v. U.S., supra.) But the passage of time in and of itself permits no such conclusion; and in this case, if anything, argues for a contrary result. For Barbour, the eight month period was spent in the Women's House of Detention, with a charge of murder pending against her. It was to end both her indefinite imprisonment and eliminate the risk of a murder conviction that she ultimately agreed to testify. Although the issue was not discussed by the Court in Karathanos, it is probable that substantial time passed for the aliens in that case. The Court properly did not conclude that because the aliens had time to mull the matter over, their decision was voluntary. Clearly, it is not the time to consider, but what goes into the consideration, which is relevant.

3. Barbour pleaded guilty, based on the evidence against her, on advice of counsel and to expose herself to a lesser scope of punishment. Appellant has no dispute with the District Court's finding in this regard - the same could undoubtably be concluded with respect to the witnesses in Karathanos.

With respect, appellant submits that the District Court assumed that since Barbour's plea was "voluntary", and therefore validly entered (about which there is no dispute) it therefore automatically broke the chain of illegality from the appellant to Barbour's testimony.

This is plainly not the test laid down by this Court. For the purpose of determining whether a witness' testimony is tainted, it matters not that the witness pleaded guilty to an offense, but why the witness did so. If the plea was the result of an exploitation of illegal conduct towards another, the plea may still be legally voluntary, and yet the resultant testimony not usable against the defendant aggrieved by that illegality. This was, of course, precisely the situation in Karathanos where the aliens could not have been heard to complain about the illegal search of the defendant's restaurant.

In the instant case, the District Judge conceded that Barbour pleaded guilty and agreed to testify "based on the evidence against her". Whether she did so on the advice of counsel about the evidence against her or on her own assessment of it is irrelevant: the critical point is that she was induced to do so because of the evidence against her; and the evidence against her was that which had been illegally obtained from the defendant, as the

District Judge himself observed:*

> By (the time of the plea) the prosecution had available to it a substantial amount of evidence against Barbour. It should be noted in this regard that evidence obtained in violation of petitioner's constitutional rights would not thereby be inadmissible against Barbour at trial.

The prosecution, therefore, had Barbour in precisely the same bind as had the Government the potential defendants in Karathanos. Through the use of the leverage created by the illegal arrest and interrogation of the appellant, the prosecution sought to (and did) obtain a conviction against the appellant which it could not have obtained against her had it not used that leverage. It will not serve the purpose of deterring future arrests without probable cause to permit the use of "such reasonably foreseeable fruits", U.S. v. Karathanos, supra, of the police conduct in this case.

The conclusion that Barbour's testimony was not an independent act of free will is all but unavoidable in light of this Court's decision in U.S. v. Cecconlini, Slip Op. 5573, September 15, 1976. There, the defendant, charged with perjury, objected to the admission against him of crucial testimony given by an employee of his. The employee come to the attention of a police officer after

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* Opinion of Judge Cannella, p. 7, fn. 1, App. B.

that officer had conducted an illegal search of the defendant's premises. The officer, and later an F.B.I. agent, questioned the employee about the evidence obtained in the illegal search, and the employee voluntarily made statements which incriminated the defendant. She later testified to the same effect before the grand jury which indicted the defendant for perjury. The District Court granted the defendant's motion to suppress, and the Court of Appeals affirmed, on the authority of Karathanos and Tane, supra. The Court rejected the Government's argument that Karathanos and Tane were not relevant because, unlike the witnesses in those cases, the employee in Ceccolini was not coerced into testifying. The Court explained that testimony derived from an illegal search is not rendered admissible merely because the witness' cooperation with the Government was not coerced. The Court distinguished the situation where a witness comes voluntarily forward on his own:

> In this case, the government agent exploited the illegally obtained information by seeking out (the employee) and asking questions directly related to the illegal search.*

Appellant submits that if the testimony of the employee in Ceccolini is suppressable, notwithstanding

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* Slip Op. 5573, note 9.

that the witness' statements were made to the police while the witness was free, and her subsequent grand jury testimony given while her status was that of a mere witness, there is no escape from the conclusion that Barbour's statements to the police, made while in police custody after being arrested for murder, and her later testimony, given as a result of a plea bargain with her which dramatically reduced her exposure to punishment, and with the enticement of a lenient sentence hanging before her, must be suppressed also.

It would appear, moreover, that Judge Van Graafeiland, who dissented vigorously in Ceccolini, would have reached the conclusion urged here: for in the instant case there is none of the evidence of the witness' willingness to cooperate which he found in respect to the employee's testimony in Ceccolini. Barbour's statement to the police was given not in the "calm atmosphere of her home and in the presence of her family", but in the 32nd precinct squad room. Barbour's questioning was not a "general inquiry" but a specific interrogation about a crime in which the police believed she was heavily involved. Barbour did not "reply without hesitation" that she would be willing to help the state; rather, she "hesitated" before testifying, all the while in detention, until she was induced to do so by the plea offer.

POINT II

THE DISTRICT COURT ERRED IN DENYING THE APPELLANT A HEARING ON WHETHER THE TESTIMONY OF THE CHIEF WITNESS AGAINST HER AT THE TRIAL WAS THE FRUIT OF THE APPELLANT'S ILLEGAL ARREST AND INTERROGATION.

It is well established that in a case properly before a Federal district court for habeas review* the court must hold an evidentiary hearing

> . . . if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court trial of fact has after a full hearing reliably found the relevant facts.**

At such a hearing, moreover, the State has the burden of proving that the evidence ilegally obtained from the appellant did not lead, directly or indirectly, to Barbour's willingness to testify. Tane v. U.S., supra.

In the instant case there was no development of this issue at or before trial in the state court. On collateral review in the state court the issue was addressed, but appellant's request for a hearing was denied. And, as appellant has demonstrated, the facts concerning the testimony of Barbour, insofar as they support any conclusion, support those presented by appellant. The state clearly did not sustain its burden of proof.

If, then, the Court agrees with appellant that she is

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* Appellant's argument in support of her right to Federal habeas review is cointained in Point III, infra.

** Townsend v. Sain, 372 U.S. 293, 312-13 (1963).

not foreclosed from habeas review - the point to which this brief now turns - it is respectfully submitted that it should either grant appellant's writ of habeas corpus or, at least, remand the case to the District Court for an evidentiary hearing.

POINT III

THE APPELLANT IS ENTITLED TO FEDERAL HABEAS CORPUS REVIEW OF HER FOURTH AMENDMENT CLAIM AS SHE DID NOT RECEIVE AN OPPORTUNITY FOR FULL AND FAIR LITIGATION OF HER CLAIM, AND DID NOT DELIBERATELY BY-PASS HER STATE REMEDY.

As noted above, the District Court denied appellant's Fourth Amendment claim on the merits, never commenting upon the question whether appellant's claim was cognizable in a Federal habeas corpus proceeding. However, since this was fully briefed by the parties in both the state and federal collateral proceedings in this case; and since the United States Supreme Court has recently treated the general question of the scope of Federal habeas in Fourth Amendment cases, Stone v. Powell, U.S. , 96 S. Ct. 3037, 49 L.Ed. 2d 1067 (1976), it seems appropriate to include a discussion of that here.

A. The appellant was not provided with an opportunity for full and fair litigation of her Fourth Amendment claim

by the State court.

In Stone v. Powell, supra, the defendant sought Federal habeas review of his murder conviction, alleging that a search producing evidence against him was illegal because it was based upon an unconstitutionally vague vagrancy statute. In the companion case, Wolf v. Rice U.S. 96 S Ct. 3037, 59 L.Ed. 2d 1067 (1976), Rice sought Federal habeas on the grounds that the search warrant which produced incriminating evidence against him was invalid. In both cases, the defendants' Fourth Amendment claims had been litigated in the state proceedings, and rejected by the State courts, and both defendants sought to relitigate their claims in Federal court. The Court rejected this effort, holding that since the defendants had had an "opportunity for full and fair liitgation" of their Fourth Amendment claims, they had no right to relitigate those claims in Federal court. The specific question in Stone was

> ... whether state prisoners - who had been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review - may invoke their claim again on federal habeas corpus review.*

The Court held that the "long recognized costs" of the exclusionary rule persist when a conviction is sought

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* 49 L.Ed. 2d at 1085 (emphasis added)

to be overturned on collateral view

> ... on the ground that a search and seizure claim was erroneously rejected by two or more tiers of state courts,*

and rejected the notion that

> ... state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule and the oversight jurisdiction of this Court or certiorari... **

The quoted language in Stone, supra, demonstrates clearly that the Court was concerned with the relitigation in Federal courts of Fourth Amendment claims already "rejected" in state proceedings. Stone did not concern, and imposed no new limitations on a state prisoner's access to Federal habeas where there had been no full and fair litigation of the claim in the state court. Access to federal review in such cases, it seems clear, continues to be governed by the Federal standards of waiver announced in Fay v. Noia, 372 U.S. 391 (1963). See also Henry v. Mississippi. Had the court intended to limit access to Federal habeas in waiver cases, it would have rejected Fay, which it did not. The new line of demarcation in Federal habeas proceedings is thus clear: where the claim has been fully and fairly litigated in state court, the aggrieved defendant may only seek review by certiorari. Where the claim

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* 49 L.Ed. 2d at 1086.

** 49 L.Ed. 2d at 1087, n. 35.

has either not been fully and fairly litigated, or where it has not been litigated at all, the federal courts, in accordance with well established rules, are free to consider the claim.

It is conceded that, on its face, the phrase "opportunity for full and fair litigation" is broad enough to cover the situation in which a defendant could have raised the Fourth Amendment claim at or before trial but failed to do so as well as the situation in which he in fact raised it. It is inconceivable, however, that the Court would so casually announce a radically different waiver standard, particularly in a case which did not call for review of the waiver issue. Moreover, the Court in Stone made it clear that the evil it sought to correct was one which exalted the position of lower federal courts over the state courts, a situation which does not arise when the state court has not adjudicated the federal claim.

Further proof that the Court in Stone did not intend to treat the waiver issue is found in the fact that, in announcing the "opportunity for full and fair litigation" standard,* it cited Townsend v. Sain, 372 U.S. 293 (1963),** the opinion which is the source of that standard. Decided

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* 49 L.Ed. 2d at 1088.

** 372 U.S., at 312.

on the same day as Fay v. Noia, supra, which dealt with a state prisoner's right to federal habeas when the federal claim was deemed waived under state law, Townsend dealt exclusively with the situation in which the defendant had litigated, or attempted to litigate the federal issue in the state proceeding. Townsend, therefore, is the progenitor of Stone v. Powell; Fay is, at best, a distant relative to Stone v. Powell, but remains the authoritative precedent for resolution of the case at bar.

The Stone Court's reliance on Townsend v. Sain, supra, also compels the conclusion that the appellant is entitled to federal habeas review despite the fact that the New York Supreme Court, in ruling on appellant's motion to vacate the judgment of conviction, reached the merits of appellant's Fourth Amendment claim, since it did so without holding a hearing, relying, as it had to, on a trial record in which the relevant facts were never developed. As noted above, the purpose of Townsend was to articulate the rules to be followed by the Federal courts in determining whether there was a full and fair opportunity to litigate the federal claim at a state court evidentiary hearing on it. Where no such hearing has taken place, there is no occasion

for invocation of the Stone rule.*

Parenthetically, appellant has found no post-Stone cases which deal with the application of Stone in a waiver situation. All of the cases which have been found involve efforts on the part of defendants to litigate in Federal courts claims rejected after litigation in the state courts.**

B. There has been no waiver by the petitioner of her right to have the writ of Habeas Corpus issued.

1. The standard for waiver applied by the state court is not binding on the Federal courts, and does not meet Federal standards.

As noted, the New York Supreme Court ruled on the merits of petitioner's claim in the collateral proceeding, albeit without holding a hearing.*** The Court also ruled that petitioner had waived her right

* At most, the fact that the New York Supreme Court reached the merits of the claim in a collateral proceeding suggests that there is no reason for abstention by the Federal courts, even if it were concluded that the state process had been "deliberately by-passed". See Warden v. Hayden, 387 U.S. 294 (1967); at note 6, and Wardius v. Oregon, 412 U.S. 470 (1973), 477 at note 10, and discussion of deliberate by-pass infra.

** Frankboner v. Paderick, Slip op. No. 75-1502 (4th Cir., 8/5/76); Caver v. Alabama, 19 Cr.L. 2548 (5th Cir., 9/2/76); George v. Blackwell, 19 Cr.L. 2487 (5th Cir., 8/25/76); Poindexter v. Wolff, Slip op. No. 75-1919 (8th Cir., 8/10/76); Roach v. Parratt, Slip op. No. 76-1215 (8th Cir., 8/17/76); Bracco v. Reed, 19 Cr.L. 2513 (9th Cir., 8/20/76); Chavey v. Rodriquez, Slip op. No. 76-1016 (10th Cir., 8/26/76); Petillo v. N.J., 19 Cr.L. 2574 (D.N.J., 8/25/76)

*** D. 3, Memorandum in Support, App. B.

to present the claim under New York law. Even assuming the validity of the state court's interpretation of New York law, this Court is not bound by that law. The instant petition must be judged by the Federal standard of waiver, not the state's. Fay v. Noia, 372 U.S. 381 (1963).*

These standards have been clearly established by the Supreme Court. See Fay v. Noia, supra; Henry v. Mississippi, 379 U.S. 443 (1965).

In Fay v. Noia, supra, the defendant sought federal habeas corpus relief on the grounds that a coerced

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* Indeed it was a central purpose of Fay v. Noia, supra, to establish that claims of waiver in federal courts be judged by federal, not state standards. See also Henry v. Mississippi, supra, and Case v. Nebraska, 381 U.S. 336 (1965). And it was Fay v. Noia, supra, itself which established that the New York law governing collateral attack - the same on which the respondent relies in the instant case - does not meet federal standards for waiver.

With one exception, every recent decision by the Second Circuit Court of Appeals found by the petitioner confirms the fact that federal "deliberate by-pass" standard, and not the State's waiver provisions, govern the waiver claim. U.S. ex. rel. Bruno v. Herold, 408 F2d 125 (1969); U.S. ex. rel. Schoedel v. Follette, 447 F2d 1297 (1971); U.S. ex. rel. Cruz v. La Vallee, 448 F2d 671 (1972).

The only exceptions to this line of cases is U.S. ex. rel. Tarallo v. La Vallee, 433 F2d 4 (1970), where the Court held that failure to comply with New York procedure constituted a waiver. There is no suggestion in that case, however, that the Court was ignoring the well-established authority on the point - the issue of deliberate by-pass was simply not mentioned. The Court's later decisions, moreover, make it clear that it recognizes that the deliberate by-pass standard announced in Fay v. Noia had to be followed. It would therefore seem reasonable to interpret Tarallo as holding implicitly that the by-pass was deliberate.

confession was used against him at his trial. The Court affirmed the judgment of the Court of Appeals granting his petition, rejecting the claim that he had waived his rights by not appealing the conviction. The Court relied upon the "classic definition of waiver" enunciated in Johnson v. Zerbst, 304 U.S. 458 (1938); holding that waiver should be defined as:

> . . . an intentional relinquishment or abandonment of a known right or privilege... There must ... be a showing that the defendant... after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state court, whether for strategic, tactical or other reasons that can be fairly described as the deliberate by-passing of state proceeding... We wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner... A choice made by counsel not participated in by the petitioner does not automatically bar relief . . . 372 U.S., at 439.

The waiver rule was further elaborated upon in Henry v. Mississippi, supra. There, the defendant (as in the case at bar) sought collateral relief on the basis that inadmissible evidence was introduced against him, despite the fact that no timely objection to that evi-

dence was made. The Court remanded the case for a hearing on the question whether there was a "deliberate by-pass" (Fay v. Noia, supra), rejecting the decision of the Mississippi Supreme Court that the fact that the defendant had competent local counsel compelled the conclusion that the claim had been waived. The Court indicated, moreover, that the Mississippi Court's observation that failure to object to the evidence was an "honest mistake" by counsel did not resolve the question. Rather, the Court ordered a hearing to determine whether the Fay v. Noia criterion for waiver -- a knowing and deliberate by-pass for strategic, tactical or other reasons -- was present. The instructions given the Court in remanding the case clearly limited the inquiry below to whether a "deliberate choice" had been made by counsel:

> If [strategic moves] motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver... alghouth trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims ...we think that the deliberate by-passing of the contemporaneous objection rule as part of trial strategy would have that effect in this case. 279 U.S. at 451-2 (emphasis added)

See also Warden v. Hayden, 387 U.S. 294 (1967); Camp v. Arkansas, 404 U.S. 69 (1971).

In its brief in the District Court, the appellee argued that Frances v. Henderson, U.S. 96 S.Ct. 1708 (1976), 48 L.Ed. 2d 149 (1976) changes the standards for determining whether a defendant has waived his constitutional claims, and that it amounts in fact, to a sub silento overruling of Fay v. Noia, 372 U.S. 381 (1963). Henderson, supra, stands for no such proposition. It dealt exclusively with the question of a collateral attack on the composition of the indicting grand jury, simply confirming its earlier decision in Davis v. U.S., 411 U.S. 233 (1975) concerning habeas petitions brought by federal prisoners, to those brought by state prisoner.

In Davis, the Court considered the waiver provisions of Rule 12(b), F.R.Cr.P., which provides that failure of the defendant to make timely objection to defects in the "institution of the prosecution or in the indictment" constitutes a waiver of such defects. The appellant argued that, pursuant to Fay v. Noia, supra, and Johnson v. Zerbst, supra, the waiver provision of Rule 12(b)(2) should not bar collateral relief absent a showing of a "deliberate by-pass". In rejecting the appellant's argument, the Court relied on Shotwell Mfg.

Co. v. U.S. 371 U.S. 341 (1963), where habeas was sought on grounds that the indicting grand jury was illegally composed, years after the conclusion of the case. The Shotwell Court rejected the petition, finding waiver under Rule 12(b)(2). It is clear, however, that the Court in Davis was concerned only with collateral claims concerning "the institution of the prosecution or the indictment" and not with claims involving illegally seized evidence, as in the case at bar. The Court offered compelling reasons for concluding that it would not apply the same waiver rule in the latter case:

> . . . The waiver provision of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings . . . If defendants were allowed to flout its time limitations, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult. 411 U.S. at 241 (emphasis added)

In contrast, the admission of illegally seized evidence has implications far beyond the institution of criminal proceedings going rather to the validity of the conviction itself.

The unique status which the Court has given to collateral attacks on the manner in which criminal proceedings are instituted, Davis, supra, was demonstrated again in a case decided the same day as Davis, Tollet v. Henderson, 411 U.S. 258 (1963).

There the defendant sought habeas corpus 25 years after his conviction after a guilty plea on the grounds that the indicting grand jury unconstitutionally excluded Negroes. While the Court's opinion dealt primarily with the standards of voluntariness in guilty plea situations, see Brady v. U.S. 397 U.S. 742 (1960), and therefore is not relevant to the case in issue here, its treatment of the waiver question is instructive. The Court conceded that on the facts before it no waiver was shown, since, "the facts relating to the selection of the ... grand jury ... were ... unknown to both respondent and his attorney." In nevertheless rejecting the petition the Court reaffirmed its holding in Brady, supra, and McMann v. Richardson, 397 U.S. 759 (1970), limiting collateral attacks on the guilty plea to the question whether they were voluntary and intelligent, and whether the advice which the defendant received from counsel was within the

range of competence demanded of attorneys in criminal cases, again not an issue here. But the Court's language strongly suggests that even in the guilty plea situation, it would deal differently with the failure of counsel to discover technical defects from substantive ones:

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have ... no matter how peripheral such a plea might be to the normal focus of the counsel's inquiry ... Counsel's concern is the faithful representation of the interest of his client ... Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution. 411 U.S. at 267 (emphasis added)

By implication, the Court distinguished the situation in which a technical challenge, leading only to delay, was not made, from the situation in which counsel failed to assert a challenge which goes to the very viability of the prosecution's case. It is worthy of note that if the Court would allow a collateral attack based on such a claim in the guilty plea situation, with its especially stringent requirement that nonwaiver and incompetency of

counsel must be shown, it would allow it in the case at bar, where no guilty plea was involved, where the issue brings into question the essence of the prosecution's case, and not some mere "plea in abatement", and where, as we have demonstrated, no waiver occurred.

Estelle v. Williams, U.S. , 96 S.Ct. 1691, 48 L.Ed. 126 (1976) decided the same day as Frances v. Henderson, supra, further supports the argument that the Court has not abandoned the deliberate by-pass rule. There, the defendant failed to object to being tried in prison clothes. The Court held that as a result of this failure, the defendant could not raise the claim in a federal habeas procedure, despite the fact that being compelled to stand trial in prison clothes would be a violation of the constitutional right to a fair trial. The Court explained why it relied upon a compulsion standard in this case:

> ... instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show ... that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury ... 48 L.Ed. 21 at 133.

Most significant, the Court then distinguished Estelle from the "alleged relinquishment of a fundamental right" of

the sort in issue in Johnson v. Zerbst, supra. The Court said:

> ... The Court (in Johnson v. Zerbst) found it difficult to conceive of an accused making a knowing decision to forego the fundamental right to the assistance of counsel, absent a showing of a conscious surrender of a known right. The Court has not, however, engaged in this exacting analysis with respect to strategic and tactical decisions, even those with constitutional implications, by a counselled accused ... 48 L.Ed.2d at 133, n. 3.

In the instant case, as in Johnson v. Zerbst, supra, it is difficult to conceive of a defendant making a knowing decision to forego the opportunity to state a compelling claim that the evidence of the chief witness against her should be suppressed. It is equally difficult to conceive that her counsel could have made a "strategic and tactical" decision to do so. In any event, the issue before this Court is not whether the claim was not made but whether it was "deliberately by-passed", "as part of trial strategy". Fay v. Noia, supra.

2. The record in the instant case demonstrates that there was no deliberate by-pass by the petitioner.

Applying the standards of Fay and Henry, to the facts

of the case at bar, it is clear that there was no deliberate by-pass of state proceedings, and hence that no waiver took place. The petitioner's affidavit, attached hereto, states that the issue of objecting to the testimony in question was never raised with her by counsel, and that she had no independent understanding of the legal issues involved. What is more critical, however, is that there there was no conceivable reason why counsel would have sought to by-pass state proceedings on this issue, and no conceivable purpose, strategic, tactical, or otherwise, for failing to object to the testimony. The issue was hardly collateral: without Barbour's testimony there was a strong possibility that the People's case would not have survived a motion to dismiss.* The petitioner's position could not have been jeopardized or worsened in any way if a hearing on the motion to suppress

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* The other evidence produced in the People's case established only that (a) a man had been shot; (b) that the defendant had been shot by a bullet which appeared to be the same caliber as that which had entered the deceased; (c) that the defendant had denied being shot; (d) that she had been seen in possession of a gun before the incident; (e) that the same gun had been found in the defendant's apartment; and (f) that the ignition keys to the deceased's cab had been found on the roof of the apartment building. There was no evidence, aside from Barbour's testimony, placing the defendant at the scene of the crime; there was no proof that the gun in evidence was the murder weapon; or that the defendant had any connection with the taxi cab keys. There were no witnesses to the event, no fingerprints recovered, and no ballistics tests possible (no bullet was found).

had been held, even if the petitioner had lost the motion. One incident which arose during the trial makes it clear, indeed, that counsel had no strategic decision in mind in failing to object to Barbour's testimony. During the defense case, an issue arose concerning the use of petitioner's statement for impeachment purposes. When the court suggested a hearing to determine whether the petitioner's statement, in addition to being obtained in violation of Miranda v. Arizona, had also been coerced, counsel refused, on the strategic, although dubious ground that the hearing would give the People the opportunity to cross-examine the defendant twice, i.e., at the hearing and then again before the jury. Had counsel even thought of objecting to the testimony of Barbour he would have recognized that no such hazard lay in store for the petitioner in a hearing on a motion to suppress: the inadmissibility of the statement had already been conceded, and only the issues which could have been raised by the People -- the existence of an "independent source" or the exercise of an intervening volitional act by Barbour -- would not have required the testimony of the petitioner at all. Indeed, demanding such a hearing would have given counsel precisely the advantage as to Barbour that he sought to deny to the prosecutor for the

petitioner: an opportunity to cross-examine the opposition case. Thus, the failure of the petitioner or her counsel to raise the objection in a timely manner seems clearly not to have been a matter of choice, or even of poor judgment. Rather, it was a non-choice, a non-judgment. The issue was clearly never thought of at all.

In a recent case arising in the United States District Court in Missouri a situation almost exactly parallel to the case at bar arose. Caffey v. Swenson, 322 F. Supp. 624 (W.D.Mo. 1971). There, there had been no objection to an allegedly illegal search at trial or on appeal. In this petition for a writ of habeas corpus counsel conceded that it simply had not occurred to him to raise the issue. The Court granted the petition, holding that when constitutional rights are involved inadvertence could not be equated with waiver. The plain language of Fay v. Noia, supra, would seem to compel a similar result in the instant case.*

* The rejection by the Stone Court of Kaufman v. U.S., 394 U.S. 217 (1969) does not undermine the argument presented here. The opinion of the Court in Kaufman was plainly directed toward the question whether 4th Amendment claims in general could be presented under 28 U.S.C. 2255, and not the more specific question of whether habeas relief could be obtained after a non-deliberate by-pass of state proceedings, an issue dealt with only in passing by the Court, see 394 U.S. at 220, note 3. In light of the fact that Fay and Henry on which the discussion of waiver in Kaufman relied, were not rejected in Stone, it is impossible to consider the rejection of Kaufman as accomplishing that end.

3. The right to a hearing on the issue of deliberate by-pass.

Since the District Court reached the merits of the Federal claim, without ruling on the waiver issue urged by the Appellee below, it is not possible to ascertain whether the Court rejected appellee's argument or simply failed to consider the issue. In the event that this Court takes the latter view, appellant submits that should the Court conclude that the record is inadequate to establish that there was no deliberate by-pass, appellant is entitled to an evidentiary hearing on the matter in the District Court, at which the State will have the burden of proving a deliberate by-pass. U.S. ex rel. Cruz v. La Vallee, 448 F2d 671 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972).

CONCLUSION

FOR THE REASONS STATED IN POINT I, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE REMANDED WITH INSTRUCTIONS TO GRANT THE WRIT OF HABEAS CORPUS.

ALTERNATIVELY, AND FOR THE REASONS STATED IN POINT II, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE REMANDED WITH INSTRUCTIONS TO CONDUCT AN EVIDENTIARY HEARING ON THE ADMISSIBILITY OF THE TESTIMONY

OF THE CHIEF WITNESS AT APPELLANT'S TRIAL IN THE NEW YORK SUPREME COURT.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

To be argued by:

Harry Subin

United States of America ex rel Theresa Simmons,	:	
Petitioner-Appellant,	:	Docket No. 76-2117
- against -	:	
Frances Clemente, Superintendent Bedford Hills Correctional Facility Bedford Hills, N.Y.	:	

APPENDIX

APPEAL FROM THE DENIAL OF A WRIT OF HABEAS CORPUS BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S. ex. rel.
Theresa Simmons,

Petitioner-Appellant

vs.

Frances Clemente, Superintendent
Bedford Hills Correctional Facility
Bedford Hills, N.Y.

United States Court
Southern District of
New York

Case No. 76-806

Judge Cannella

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B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

THERESA SIMMONS,

Petitioner,

-against-

FRANCES CLEMENTE, Correction Superintendent, Bedford Hills Correctional Facility, Bedford Hills, New York,

Respondent.

- X

MEMORANDUM DECISION

76 Civ. 806 (JMC)

CANNELLA, D.J.:

Petitioner, Theresa Simmons, currently confined to Bedford Hills Correctional Facility, was convicted of felony murder on January 24, 1967, after a jury trial in the Supreme Court of the State of New York, New York County, she was sentenced to a term of natural life. She petitions for a writ of habeas corpus alleging that evidence used against her was obtained as the result of an unconstitutional arrest followed by an interrogation which violated her fifth amendment rights. The application is denied.

FACTS

On January 13, 1966, Martin Seiler was shot and killed in his taxicab. Shortly thereafter, petitioner

was apprehended and after a substantial amount of questioning the police learned of petitioner's accomplice, Peggy Barbour. Barbour was found and arrested the following day, and after admitting her involvement in the crime, she gave a formal statement to Assistant District Attorney Thomas Hughes.

Both petitioner and Barbour were charged with homicide and on September 19, 1966, on the advice of counsel, Barbour pleaded guilty to a charge of manslaughter in the second degree. In January of 1967 she testified at petitioner's trial, providing the only evidence in the case-in-chief which placed petitioner at the scene of the crime and described petitioner's role in it.

Petitioner contends that the use of Barbour's testimony violated her rights under the fifth and sixth amendments in that Barbour's identity was discovered during an unconstitutional interrogation of petitioner which took place after an arrest not supported by probable cause. The Court concludes that, assuming the illegality of the arrest and interrogation, Barbour's testimony was sufficiently a product of free will to purge the primary taint.

DISCUSSION

Essentially, this case forces the Court to determine the point at which testimony of a witness whose identity is discovered during an unconstitutional interrogation is no longer derived from the illegally obtained statement. Under the standards set out in Wong Sun v. United States, 371 U.S. 471 (1963), evidence is not "fruit of the poisonous tree" merely because it would not have been discovered but for the illegal conduct of the police. Rather, the question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or by means sufficiently distinguishable to be purged of the primary taint." 371 U.S. at 487-88.

Applying this standard to allegedly tainted testimony, courts have concluded that "the proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized." Smith v.United States, 344 F.2d 545, 547 (D.C. Cir. 1965), quoting from Smith v. United States, 324 F.2d 879, 881 (D.C. Cir. 1963), cert. denied, 377 U.S. 954 (1964). Accord, United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964). Factors to be considered in determining whether

live testimony was elicited through the use of illegally obtained evidence or was sufficiently a product of free will to purge the taint of the constitutional violation include (1) whether the purpose of the illegal conduct was to seize the witnesses and such seizure enabled the Government to Exert leverage over them, United States v. Karathanos, 531 F.2d 26, 35 (2d Cir. 1976); (2) whether the witness would have come forward of his own volition, United States v. Marder, 474 F.2d 1192, 1196 (5th Cir. 1973); (3) whether the witness agreed to testify only after reflection, Smith v. United States, 344 F.2d 545, 547 (D.C. Cir. 1965); (4) whether there was an initial unwillingness to testify on the part of the witness, United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964); and (5) whether the testimony has remained unchanged throughout, McLindon v. United States, 329 F.2d 238, 241 n.2 (D.C. Cir. 1964). Of course, this list is by no means complete and each case must be examined individually to determine the basis of the witness's decision to testify. United States v. Karathanos, 531 F.2d at 35; United States v. Tane, 329 F.2d at 853.

In particular, where the alleged illegally obtained evidence is the identity of the witness, the law of this circuit makes it clear that something more than

mere discovery of the witness is needed to establish a sufficiently close connection between the initial illegality and the evidence introduced at trial to result in the suppression of that evidence. United States v. Karathanos, 531 F.2d at 35, United States v. Tane, 329 F.2d at 853. Such a connection is not disclosed by the record in this case, nor is it alleged in the petition.

Thus, under the facts of this case the Court finds that Barbour's decision to testify was an independent act of free will. Barbour was arrested and confessed on January 14, 1966. Eight (8) months later, based on the evidence against her [1/] and on advice of counsel, she pleaded guilty to a lesser crime than the one originally charged and was thereby exposed to a lesser scope of punishment. Sentencing was adjourned until after petitioner's trial and Barbour ultimately was sentenced to a term of imprisonment of from one (1) to five (5) years. Barbour's testimony, coming a full year after petitioner's alleged illegal arrest and interrogation, was not the result of Government exploitation of such conduct, but the result of her voluntary "decision to plead guilty" and "subsequent determination to testify

as a Government witness."[2/] United States v. Hoffman, 385 F.2d 501, 504 (7th Cir. 1967), cert. denied, 390 U.S. 1031 (1968) (a case which is identical in all relevant respects to the situation presently before the Court).

Accordingly, petitioner's application for a writ of habeas corpus is denied.

SO ORDERED.

John M. Cannella

JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
August 12, 1976.

FOOTNOTES

1/ By that time the prosecution had available to it a substantial amount of evidence against Barbour. It should be noted in this regard that evidence obtained in violation of petitioner's constitutional rights would not thereby be inadmissible against Barbour at trial.

2/ These decisions, of course, were substantially motivated by Barbour's desire to ease her own punishment.